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No. 278

In the Supreme Court of the United States

OCTOBER TERM, 1942

MURRAY R. SPIES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

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OPINIONS BELOW

The District Court rendered no opinion. The *per curiam* opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 429) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 6, 1942 (R. 430). A petition for a writ of certiorari was filed August 3, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule

XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934.

QUESTIONS PRESENTED

1. Whether an indictment which charges that the petitioner wilfully attempted to evade and defeat his income tax by means of a wilful failure to file a tax return and a wilful failure to pay any income tax (which means are misdemeanors under Section 145 (a) of the Revenue Act of 1936) sufficiently alleges a felony under Section 145 (b) of the Act.

2. Whether the trial court sufficiently instructed the jury with respect to the element of wilfulness and evidence regarding the petitioner's physical condition at about the time of the offense.

STATUTE INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 145. PENALTIES.
>
> (a) Any person required under this title to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this title, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other

penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

STATEMENT

Murray R. Spies, the petitioner, is an attorney-at-law (R. 134–135) who was indicted in the Southern District of New York on a charge of wilfully attempting to evade and defeat an income tax of $8,841.63 due upon a net income of $50,587.11, on or before March 15, 1937, for the calendar year 1936. The indictment charged that as a means of wilfully attempting to evade and defeat the said tax, on or about June 15, 1937 (the date of expiration of an extension of time for filing a return and paying the tax), the petitioner did wilfully and knowingly fail to make an income-tax return and wilfully failed to pay any

income tax (R. 4–7). After the jury was impaneled and sworn the petitioner moved to dismiss the indictment on the ground that it did not allege any affirmative act and hence did not charge any offense under Section 145 (b) of the Revenue Act of 1936, *supra*. This motion was denied (R. 9–15). At the end of the Government's case the petitioner's motion to dismiss the indictment was renewed (R. 128–129) and denied (R. 132).

The petitioner conceded that there was an income of $40,000 for the year 1936 on which a tax of approximately $6,000 was due, and a failure to file a return and to pay a tax (R. 15, 132). Four doctors of medicine testified on his behalf regarding his alleged physical condition at about the time of the offense (R. 190–205, 226–241, 348–365). Dr. Jewett, one of these witnesses, in response to a long hypothetical question, testified that in his opinion the petitioner was suffering from psychoneurosis (R. 226–236), and that this condition could interfere with his will to carry out his opinions, wishes, or desires in many ways (R. 233). With respect to this matter the trial court charged the jury as follows (R. 401):

> You have heard a number of experts on the stand in this case. The credibility of witnesses who are experts and the weight of their testimony is likewise a question for the jury. The jury is not bound to accept the opinion of an expert simply because no other expert contradicted him. Indeed the only difference between expert witnesses

and other witnesses is that experts are permitted, under the law, to testify as to their opinions. The jury must decide whether and to what extent to accept the opinions of the experts.

One of the witnesses called on behalf of the defendant—Dr. Jewett—had not examined the defendant. You will recall that his testimony was based upon a hypothetical question. It is within the province of the jury to decide which of the facts hypothetically stated to that witness actually exist. If the jury finds that none of the facts hypothetically stated is true, then, of course, the opinion is entirely without weight. It is not, however, to be understood that the entire opinion fails unless all of the assumed facts are found by the jury to be true. The jury may accord weight to the expert's answer as it find[s] the assumed facts to have been proven.

The court further instructed the jury with respect to a wilful attempt to evade a tax as follows (R. 402–403):

Before you find the defendant guilty you must find that intentionally and wilfully he attempted to evade or defeat the tax.

The law uses the word "attempt". Attempt means to try to do or accomplish. In order to find an attempt it is not necessary to find affirmative steps to accomplish the prohibited purpose. An attempt may be found on the basis of inactivity or on refraining to act, as well.

The statute also uses the word "evade". That word has been defined to mean to avoid by artifice, to avoid by device or stratagem, by concealment, by intentionally withholding a fact which ought to be communicated.

Such evasion must be differentiated from the use of legitimate means to minimize the tax. The latter is not a crime; but a wilful attempt to evade a tax is a crime.

The statute uses the pord "wilfully". I will try to define that word. Wilfully often denotes an act which is intentional, or knowing or voluntary as distinguished from accidental. But when used in a criminal statute, it generally means an act done with a bad purpose; without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful, or conduct marked by a careless disregard whether or not one has the right to so act.

Again with respect to wilfulness I will charge you, as I did with respect to attempt, that wilfulness is not limited to acts of commission—affirmative acts. It may describe omissions, or failure to take required action.

The petitioner was found guilty as charged (R. 412). A motion in arrest of judgment on the ground that the indictment failed to state facts constituting any crime was denied (R. 414), and a sentence of a year and a day was imposed (R.

415). Upon appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 418–427), the judgment of conviction was affirmed (R. [redacted]).

ARGUMENT

I

The indictment in this case charged that petitioner had wilfully attempted to evade and defeat the tax and stated the means relied on to constitute that charge. It was in the usual standard form which has been held sufficient in many cases. *O'Brien* v. *United States*, 51 F. (2d) 193 (C. C. A. 7th), certiorari denied, 284 U. S. 673; *United States* v. *Miro*, 60 F. (2d) 58 (C. C. A. 2d); *Oliver* v. *United States*, 54 F. (2d) 48 (C. C. A. 7th), certiorari denied, 285 U. S. 543; *Bowles* v. *United States*, 73 F. (2d) 772 (C. C. A. 4th), certiorari denied, 294 U. S. 710; *Kitrell* v. *United States*, 76 F. (2d) 333 (C. C. A. 10th), certiorari denied, 296 U. S. 643; *Capone* v. *United States*, 56 F. (2d) 927 (C. C. A. 7th), certiorari denied, 286 U. S. 553. There is no decision to the contrary. Evidence was introduced which sustained the allegations in the indictment and the jury found petitioner guilty.

Petitioner does not make any contention regarding this aspect of the case not previously considered and found wanting in two or more of the cases previously cited. His contention that he was improperly convicted of a felony because all that was charged and proved against him were

omissions specifically made misdemeanors by another subsection of the section under which he was convicted, has been considered and answered in *United States* v. *Miro, supra; O'Brien* v. *United States, supra; Oliver* v. *United States, supra; Bowles* v. *United States, supra;* and *Kitrell* v. *United States, supra.* No decision supports his contention. His further contention that no offense under the statute herein involved can be committed without affirmative action and that failure to do any of the acts required by the tax laws cannot be regarded as an "attempt" to defeat or evade them, has been considered and rejected in *United States* v. *Miro, supra,* and *O'Brien* v. *United States, supra.* No decision supports his contention.

II

With respect to petitioner's further contention that the trial court erred in failing to give certain requested instructions in connection with the element of wilfulness (Pet. 2, 10, 15–16), as shown by the Statement, *supra,* pp. 5–6, the trial court fully, fairly, and correctly instructed the jury in this respect. See *United States* v. *Murdock,* 290 U. S. 389. Apparently referring to requested instructions Nos. 21, 22, 23, and 24 (R. 394), the petitioner is in error in suggesting (Pet. 2) and stating (Pet. 16) that the trial court failed to give these instructions or "any instruction at all upon the subject." See Statement,

supra, pp. 4–5. The instructions requested by petitioner were equivalent to a direction that if the jury found that the petitioner's physical condition was as alleged, the jury must find that petitioner's omissions were not wilful and that petitioner was not guilty. The question of wilfulness is a jury question (*United States* v. *Murdock*, *supra*, p. 396) and petitioner was not entitled to have the court instruct the jury as to what weight the jury must give to particular items of evidence. The court properly refused to single out and overemphasize such expert medical testimony. *Perovich* v. *United States*, 205 U. S. 86, 92.

CONCLUSION

The decision below is correct. Neither an important question of law nor a conflict of decisions is presented. It is, therefore, respectfully submitted that the petition should be denied.

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